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No. 08-88

In the Supreme Court of the United States

STATE OF VERMONT,
Petitioner,

v.

MICHAEL BRILLON,
Respondent.

On Writ of Certiorari to the
Vermont Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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November 17, 2008

QUESTIONS PRESENTED

1. Whether delays caused solely by a defendant and his public defender(s) can arise to a speedy trial right violation, and be charged against the State pursuant to the test in *Barker v. Wingo*, 407 U.S. 514 (1972), on the theory that public defenders are paid by the state (with a small "s").

2. Whether the right to counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), should result in broader speedy trial rights to indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test.

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INTRODUCTION

In what appears to be a first in the history of American jurisprudence, the Vermont Supreme Court has vacated a felony conviction and barred a retrial on Sixth Amendment speedy trial grounds even though the trial delays at issue were caused *solely* by the defendant and his assigned attorneys, while the prosecution time after time objected to the delays. While every other state and federal court across the country has ruled that delays caused by a defendant's counsel are charged against the defendant under the *Barker v. Wingo*, 407 U.S. 514, 530 (1972) test, the Vermont Supreme Court found that a constitutional speedy trial violation supposedly had occurred based on the unique theory that the delays of defendant and his publicly-funded counsel were part of "the criminal justice system provided by the state." Pet. App. 27. Accordingly, even though the Vermont Supreme Court did not find any fault whatsoever with the prosecution, the court directed the trial court to vacate the conviction and dismiss the case with prejudice. Pet. App. 38.

This ruling turns thirty-six years of settled jurisprudence into chaos. Public defenders and court-appointed counsel now have the incentive to delay cases in the hope that their clients may one day go free due to the delay. Indeed, indigent criminal defendants who face certain conviction and lengthy sentences would have every incentive to delay. This case is a perfect example. Here, the defendant had six different assigned lawyers because: he fired his first lawyer (Pet. App. 19), his second lawyer withdrew due to a conflict (*id.*), he

fired his third lawyer (and also threatened him, forcing his withdrawal) (Pet. App. 20), he fired his fourth lawyer (Pet. App. 20-21), and his fifth lawyer withdrew due to modifications in his contract with the Office of the Defender General (Pet. App. 22-23).

The fact is, were it not for Brillon's own conduct, this case would have been tried expeditiously. The prosecution was ready to go to trial within seven months of Brillon's arraignment, and Brillon's first lawyer was also largely ready by that time. Indeed, the trial court denied Brillon's motion for a continuance and was pressing the case to trial for February 2002, when Brillon fired his first lawyer. Despite Brillon's firing of his first lawyer, and the withdrawal of his second due to a conflict, Brillon's third counsel was essentially ready for trial within a year of the arraignment. Again, Brillon prevented the trial, this time by threatening the attorney's life, thereby forcing his withdrawal. Brillon then went on to fire his fourth lawyer. By firing three lawyers, Brillon essentially won the lottery with a "get-out-of-jail-free card" made entirely by his own doing.

Moreover, with this decision, the Vermont Supreme Court has wrongly applied the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to create different classes of speedy trial rights for indigent and non-indigent defendants, each of whom receives different benefits and deficits. Under this ruling, indigent defendants have far greater speedy trial rights than those who retain private counsel. Delays caused by private counsel do not get charged to the State because those lawyers

are not employed by the state.[1] Indigent defendants are far better off: whatever happens, it is the State's fault.

But while their speedy trial rights are enhanced, indigent defendants are disadvantaged in other ways. For example, the State and the trial courts are put in the untenable position of having to consider requests for continuance differently when the request is made by a public defender, because any continuance granted to a public defender will be charged as though it was the prosecution that requested it. Thus, the State and the trial courts will be compelled to deny requests for continuance made by public defenders, and indigent defendants may be forced to trial before their counsel are ready. Moreover, the State and the trial courts will be reluctant to agree to any change in assigned counsel because the delays caused by such a change are attributable to the state. In a perverse way, while affording indigent defendants greater speedy trial rights, the indigent defendant otherwise is actually made worse off by the *Brillon* decision.

In short, the *Brillon* decision has created chaos in a vital area of criminal law. The State of Vermont urges the Court to vacate the decision.

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[1] We shall follow the Vermont Supreme Court's use of "State" to refer to the prosecution, and "state" to refer to the criminal justice system funded by the state of Vermont. *See* Pet. App. 4.

OPINIONS BELOW

The order and judgment of the District Court of Bennington County denying defendant's first speedy trial motion is reprinted at Pet. App. 75-79, and the District Court's order denying Defendant's renewed speedy trial motion is reprinted at Pet. App. 59-73. These orders are not otherwise published. The Vermont Supreme Court's decision reversing the district court is reprinted at Pet. App. 3-58 and is published at *State v. Brillon*, 955 A.2d 1108 (Vt. 2008).

JURISDICTION

The Vermont Supreme Court rendered its decision on March 14, 2008, Pet. App. 3, and denied rehearing on April 16, 2008. Pet. App. 81. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .

STATEMENT OF THE CASE

Michael Brillon was charged with felony domestic assault for striking his girlfriend on July 30, 2001. Pet. App. 3-4. Because Brillon had three prior felony convictions, he was also charged as a

habitual offender, making him eligible for a life sentence pursuant to 13 V.S.A. § 11. Pet. App. 4. Brillon was found guilty after a jury trial in June of 2004, and sentenced to 12 to 20 years. Pet. App. 24.

The causes of this three-year delay are not in dispute. The day before his case was scheduled for jury draw, which was to begin on February 26, 2002 – less than seven months after Brillon's arraignment – Brillon discharged his public defender. Pet. App. 19. The trial court reassigned the case to the first level conflict counsel, a private attorney who had contracted to serve when the public defender had a conflict.[2] The first level conflict counsel reported that he had a conflict of interest, so the court reassigned the case to the second level of conflict counsel (Brillon's third lawyer). Pet. App. 19-20. Three months later, in May of 2002, Brillon tried to fire this new lawyer as well. Pet. App. 20.

Rather than simply grant Brillon's request, the trial court held a hearing during which *Brillon's counsel indicated that he was prepared and had ample time to go forward*. J.A. 216-219. But then,

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[2] Vermont funds its public defender system on a statewide, rather than local, basis. The state legislature sets the budget for the Office of Defender General, and the Office of Defender General distributes those funds across the state, including to the Bennington County Public Defenders Office, and to private counsel who are retained under contract to serve as conflict counsel when the Public Defender is removed from a case. *See* 2008 Vt. Laws 90, Sec. 16 and 13 V.S.A. § 5251. Such private counsel are retained in a predetermined order (first level, second level, etc.)

confronted with the prospect of an impending trial, Brillon managed to derail the proceedings by threatening his lawyer during a break in the hearing, so that the lawyer was forced to move for withdrawal. J.A. 223-226. Due to Brillon's own conduct, the trial court thus had no choice but to assign the case to the third level of conflict counsel – Brillon's fourth lawyer. J.A. 226. In November 2002, Brillon requested that his fourth lawyer be fired, and a hearing was held. At the hearing, Brillon complained that the lawyer did not return his telephone calls. J.A. 236. Confronted with Brillon's behavior, the lawyer advised the court that his contract with the Office of the Defender General had expired, and that he was seeking to have the case reassigned. J.A. 232-233. The court then granted Brillon's motion to dismiss his counsel – the third lawyer that Brillon had fired.

Once again, on November 26, 2002, the court ordered the Office of Defender General to assign a new lawyer to Brillon. J.A. 24. Brillon's fifth lawyer was assigned according to court records on January 15, 2003. J.A. 25. Three months later, that lawyer sought to withdraw due to modifications in his contract with the Office of the Defender General. Pet. App. 22-23. For the following four months, Brillon was without counsel, and he filed a pro se motion to dismiss his case due to the delay in bringing his case to trial. *Id.* Brillon's sixth, and final, lawyer was assigned to the case on August 1, 2003. Pet. App. 23. On February 23, 2004, Brillon's sixth lawyer filed a motion to dismiss for lack of a speedy trial. Pet. App. 24. The trial court denied the motion on April 19, 2004, finding that much of

the delay was the result of defendant's own actions and that defendant had failed to demonstrate actual prejudice. *Id.* Defendant's trial took place in June, 2004, and he received a sentence of twelve-to-twenty years in prison. *Id.*

A sharply divided Vermont Supreme Court reversed, by a three-to-two vote. The majority found that:

> Given these facts, we conclude that a significant portion of the delay in bringing defendant to trial must be attributed to the state, even though most of the delay was caused by the inability or unwillingness of assigned counsel to move the case forward. The defender general's office is part of the criminal justice system, and ultimately it is the court's responsibility to assure that that system prosecutes defendants in a timely manner that comports with constitutional mandates. While some of the delay in this case certainly is attributable to defendant, a significant portion is attributable to the criminal justice system provided by the state.

Pet. App. 27-28.

The dissent, written by Justice Burgess, contended that, "Today the majority frees a convicted woman beater and habitual offender, not because of any infirmity in the evidence or unfair prejudice in the trial by which a jury found him

guilty, but because the defendant delayed the proceedings for almost twenty-two months." Pet. App. 39.

SUMMARY OF THE ARGUMENT

The Court should vacate the decision of the Vermont Supreme Court for two reasons.

First, the Court should reverse the Vermont Supreme Court's ruling and hold that these delays, caused *solely* by a defendant and his counsel, cannot constitute a speedy trial right violation under *Barker v. Wingo*.

Second, the Court should also reverse the Vermont Supreme Court's decision because the Vermont ruling impermissibly creates different constitutional speedy trial rights for indigent and non-indigent defendants, both granting indigent defendants broader rights than those who can retain private counsel, while at the same time placing indigent defendants in peril of having their cases pushed to trial before their counsel are ready, or being forced to go to trial with a lawyer who otherwise would have been permitted to withdraw. While Brillon has argued that this argument was not raised before the Vermont Supreme Court and that this Court, therefore, cannot consider the argument, his point is without merit. To begin with, the State did raise the argument in its Motion for Reargument. Moreover, this Court can consider new arguments when they merely enlarge the Federal question considered below. Finally, it is also within

this Court's discretion to consider Federal questions even though they were not raised in the state courts.

ARGUMENT

I. ALL OF THE DELAYS IN THIS CASE WERE CAUSED BY BRILLON OR HIS COUNSEL.

There is no dispute that the three-year delay in getting this case to trial was caused exclusively by Brillon, Brillon's various counsel, and the Office of the Defender General. The State played no role, whatsoever, in the delay, and instead, worked diligently to press the case to trial. Because the responsibility of Brillon and his counsel for these delays should be controlling under *Barker v. Wingo*, the State will discuss them at length here.

Largely due to his own conduct, Brillon had six different lawyers between the time of his arraignment and the time of the jury's verdict.[3] We will discuss each lawyer in turn.

A. Brillon Fired His First Lawyer, Richard Ammons.

This case would have been tried within approximately six months of Brillon's arraignment by Brillon's first lawyer had Brillon not fired him to delay the case.

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[3] Because this case was decided on direct appeal (rather than after a post-conviction hearing alleging ineffective assistance of counsel), there is little in the record setting forth exactly what each lawyer did, or did not do.

Brillon's first lawyer, Richard Ammons, was employed as a public defender in the Bennington County Public Defender's Office. J.A. 13. Mr. Ammons represented Brillon from the time of the arraignment on July 30, 2001 until February 25, 2002.

The docket entries show that Mr. Ammons filed a motion to recuse the Judge (the Honorable Karen R. Carroll) on October 3, 2001. J.A. 15. Brillon wanted a different judge because Judge Carroll had handled Brillon's family court matter, and Brillon claimed that she was prejudiced against him. Judge Carroll denied the motion to recuse, and forwarded it to the administrative judge, who also denied the motion. J.A. 80.

However, Brillon still had the possibility of removing Judge Carroll from the case. Judges in Vermont rotate in and out of the various counties, and Judge Carroll was scheduled to rotate out of Bennington County in March of 2002. J.A. 108-109. This planned rotation gave Brillon every incentive to delay the trial. If Brillon could possibly delay the trial past March, he would be guaranteed a different judge – despite having lost the motion to recuse.

Meanwhile, the State was diligently pushing for trial. On December 28, 2001, the State filed a motion requesting that the case be placed on the trial list for February. J.A. 89. In that motion, the State said that "depositions and documentary discovery are complete." *Id.* Clearly, Mr. Ammons had already taken a number of depositions, and the

docket entries for January 9, 15 and 16, 2002 show that Mr. Ammons had taken at least twelve depositions by then. J.A. 18.

Mr. Ammons responded by moving to delay the case, with the filing of a motion for a continuance. J.A. 91. Continuing to push for trial, the State objected to the continuance. J.A. 94. The court denied the motion on January 23, 2002. J.A. 19. Mr. Ammons filed a second motion for a continuance on February 22, 2002. J.A. 97. Judge Carroll held a hearing on February 22, 2002. Tellingly, Mr. Ammons asked for a continuance "to at least April." J.A. 164. Of course, by April, Judge Carroll would have rotated out of Bennington County, so granting such a continuance would have had the same effect as granting the motion to recuse the judge.

In his motion, and at the hearing, Mr. Ammons complained about his caseload, and said, without offering any support, that the public defender's office was supposedly "under funded and under staffed." J.A. 165. In fact, as noted above, counsel had completed all of the depositions, including *two* depositions of the victim. J.A. 167-168.

Mr. Ammons also claimed that potential "new" witnesses had come to Mr. Ammons' attention "this past week." J.A. 169-170. However, Mr. Ammons forthrightly told the court that, "there are some ethical issues with regard to my using these people as witnesses, and beyond that, it would be, I think, inappropriate for me to elaborate further." J.A. 169.

Mr. Ammons also claimed that he had to speak to the victim's doctor, and that he wanted to take a vacation in March. J.A. 173. In its continuing effort to get the case to trial, and because the State believed that the logical inference to be drawn was that defense counsel's unsupported motion for a continuance was designed to get the trial moved until April, by which time Judge Carroll would have rotated to another county, the State objected to Mr. Ammons' second request for continuance. The State argued that the motion was "just part and parcel of an effort by the defense to have the Court not hear this matter …." J.A. 180.

At the close of the hearing, Judge Carroll denied the motion for continuance, and the case was scheduled for jury draw on February 26, 2001, J.A. 20-21, less than seven months after Brillon's arraignment. Having failed twice to delay the trial, Brillon turned to his fallback strategy – to delay the trial by getting rid of his counsel. The following on-the-record conversation ensued with Brillon (who appeared through interactive television, J.A.162):

> MR. AMMONS: Mr. Brillon wanted to say something. Mr. Brillon, this is Rick. You and I can speak privately, and if you have other issues you want me to raise, we'll raise them before the Court that way. Okay?
>
> THE DEFENDANT: Ms. Carroll, before you go anywhere – What? She doesn't want to hear me or what?

COURT OFFICER: We're through now.

THE DEFENDANT: You're fired, Rick.

J.A. 186-187. There was no discussion of why Brillon fired Mr. Ammons at that time.

Three days later, on February 25, 2002, Mr. Ammons filed a motion to withdraw, noting, among other things, that Brillon had fired him on February 22, 2002. J.A. 103. Again, the State objected. J.A. 196. The court held a hearing that same day, and Mr. Ammons said that Brillon's firing him "is certainly the triggering factor," but that there were other reasons that were "alluded to" in his motion, and that he was not "in a position to give factual" details. J.A. 192-193. Mr. Ammons and the court continued to allude to these ethical issues throughout the hearing:

> MR. AMMONS: ... I think the quality of the relationship between myself and Mr. Brillion [sic] has been compromised significantly to the point that I cannot adequately represent him. Our relationship has suffered and beyond that, I'm reluctant to say more.

J.A. 194.

> THE COURT: ... What bothers me at this point is that due to the recent events . . . that Mr. Ammons is now saying he cannot zealously represent Mr. Brillion [sic], and that is what concerns the Court

> because the Court can't require an attorney to violate his ethical obligations.

J.A. 198-199.

> THE COURT: Well, okay. My take on it was in order not to prejudice his client further, the two of them had considerations after our meeting here on Friday that leads Mr. Ammons to believe he can't effectively represent his client without – by having him go into the detail of that, I think that those conversations could prejudice the Court as far as statements that may have been made by Mr. Brillion [sic] to Mr. Ammons, but Mr. Ammons can speak to that.
>
> MR. AMMONS: That's essentially it . . . .

J.A. 200.

Over the State's continuing objection, J.A. 199, the court granted Mr. Ammons' motion to withdraw. As a result, Brillon got the delay he wanted and a new judge.

In sum, the only reason Brillon's case was not tried within seven months after his arraignment, in February of 2002, was because Brillon fired Mr. Ammons on the eve of trial. The State was ready for trial, and the trial court obviously thought that Mr. Ammons was ready as well, as the court denied his motion for a continuance.

B. Brillon's Second Lawyer, Matthew Harnett, Withdrew Due to a Conflict.

The court next assigned the case to Mathew Harnett on February 28, 2002. J.A. 21. The next day, the Office of the Defender General informed the Court that Mr. Harnett had a conflict, and a new lawyer, Gerard Altieri was assigned to the case. *Id.*

C. Brillon Tried to Fire his Third Lawyer, Gerard Altieri, and, When that Failed, Brillon Threatened Altieri's Life, Thereby Forcing his Withdrawal.

Brillon's third lawyer, like his first, was ready to expeditiously proceed to trial as the State continued to press the case forward, until Brillon again managed to force his lawyer off the case.

Gerard Altieri represented Brillon from March 1, 2002 through June 11, 2002. One month into the representation, on April 2, 2002, Mr. Altieri filed a Notice of Self Defense. J.A. 21. But, by May, Brillon was dissatisfied, and he filed a motion to dismiss Mr. Altieri. J.A. 113. Brillon raised five grounds: that Mr. Altieri supposedly had not filed motions that defendant was entitled to; that there was supposedly "virtually no communication whatsoever from attorney," that Mr. Altieri supposedly had not provided him with copies of discovery material; that Mr. Altieri supposedly had refused to create an attorney-client relationship; and that Mr. Altieri supposedly had claimed that he could not be diligent because of his case load. *Id.*

The court (the Honorable John Wesley) held a hearing on the motion to dismiss counsel on June 11, 2002. The State once again objected to the dismissal, noting that:

> I honestly have concerns about counsel being repeatedly appointed. The State has seen cases like that where a delay of years is involved because the defendant isn't happy with the facts. Not that he isn't happy with his counsel.

J.A. 221.

Mr. Altieri disagreed with most of Brillon's claims. He noted that he had not sent Brillon some deposition transcripts, J.A. 207, but he took issue with everything else. He said that Mr. Ammons had taken twelve depositions and done a full evidentiary hearing, and that, while Brillon wanted "for me to somehow bring in a lot of people ... I don't want to use the words trash, but impeach Mrs. Tatro. I'm not sure that stuff is admissible." J.A. 216-217. Mr. Altieri went on to say, "And you have seen me try complex cases before and I'm willing to work with the man, but I cannot do a lot of things he wants me to do, and I am not the first attorney he's fired." J.A. 218. Mr. Altieri continued that, "if Mr. Brillion wants me to go on a fishing expedition and haul in people and relatives just to trash his wife, I don't think a judge is going to allow me to do that. At least not in front of the cases I've tried downstairs. And if it's not relevant, I think it could hurt the case potentially in front of a jury." *Id.*

Despite Brillon's conduct, Mr. Altieri argued that he should remain on the case. He told the court that he had not "had the case that long and I think we do have a vital trial strategy"; and that there were "very few motions to file … and I can do that ...." J.A. 218-219.

Clearly, with both Mr. Altieri and the State in agreement that Mr. Altieri should remain as counsel, Brillon's motion to dismiss Mr. Altieri did not look promising. So, Brillon took action to make sure that Mr. Altieri was off the case: during a break, he threatened his lawyer's life.

When the parties returned from the break, the following discussion occurred on the record:

> MR. ALTIERI: One further issue. I asked Mr. Brillion [sic] during the break if he still wanted me to represent him and I think I'll let him address that, but I think he emphatically said no and I understand that but I won't tolerate the threats to my life. I won't tolerate that. And maybe before you make those threats you should learn a little bit about my background, but this man could fill you in on –
>
> THE DEFENDANT: Yeah, I know. You're all buddies. That's what concerns me.
>
> THE COURT: Mr. Altieri.

MR. ALTIERI: I don't take threats to my life -

THE DEFENDANT: I didn't threaten you. I told you you did not need to work in collusion.

THE COURT: Mr. Brillion [sic], I have been trying as hard as I can to conduct in a judicious fashion, and I will remind everyone in the courtroom now. You don't talk to one another. You talk to the Court.

MR. ALTIERI: As I was saying, I'll make the threat very specific and I'll use the foreign language to describe the expletive that was said. But it was, "If it takes 20 years to get even with you, I will get you." And I have heard these threats before from you, Michael, because I have represented you before, so at this state I don't see how I want to stay on this case. Normally I would, but you start threatening my life, I take that very seriously.

THE DEFENDANT: I threatened your life, Gerry?

MR. ALTIERI: Yeah. You said you'd take 20 years - -

* * *

> THE COURT: I'm not concerned with Mr. Ammons. I want you to focus on the issue with Mr. Altieri. Mr. Altieri has just indicated to you that you threatened him.
>
> THE DEFENDANT: I didn't threaten his life.
>
> THE COURT: Did you say, "If it takes me 20 years, I'll get you."?
>
> THE DEFENDANT: That's not exactly what I said, sir ….

J.A. 223-226.

Judge Wesley then granted the motion to dismiss Mr. Altieri, telling Brillon that, "this is somewhat of a dubious victory in your case because it simply prolongs the time that you will remain in jail until we can bring this matter to trial …." J.A. 226. Judge Wesley then said that, "I will be in contact with the District Court Clerk this afternoon to ask her to make a diligent search for counsel. I can't promise you at this point how long that will be because I know for a fact that our resources for ad hoc counsel are perilously thin." J.A. 227.

In sum, at this point, Brillon's counsel made clear on the record that the case was essentially ready for trial – for the second time, within a year of Brillon's arraignment. Certainly, the State was ready. The *only* reason that there was any additional delay was the need, once again, to find

new defense counsel because Brillon threatened his lawyer's life.

D. Brillon Fired his Fourth Lawyer, Paul Donaldson.

Brillon's fourth lawyer, Paul Donaldson, was assigned later that same day, on June 11, 2002. J.A. 23. Two months later, Brillon wrote a letter to the Judge complaining that Mr. Donaldson was not qualified to be his lawyer. J.A. 153. Then, on October 22, 2002 – again, on the eve of trial – Brillon moved to dismiss Mr. Donaldson. J.A. 115. Brillon's motion to dismiss Mr. Donaldson is nearly identical to the motion he filed to dismiss Mr. Altieri. *Id.*

A hearing was held on November 26, 2002 before the Honorable David Suntag. Brillon complained, not that Mr. Donaldson was not competent (as he said in his letter), nor that Mr. Donaldson failed to file motions or provide copies of discovery (as he said in his motion), but merely that Mr. Donaldson failed to return his phone calls. J.A. 236.

Mr. Donaldson did not respond to those complaints, but instead explained that his contract with the Defender General had expired in June, and that he had had discussions with the Defender General about getting the case reassigned "because of the nature of the case." J.A. 233. Mr. Donaldson further said that, "My discussion with the Defender General's office have been for quite some time since the contracts were up were can I get some of these cases – some case relief on some of these cases and

his case is one of these cases that – that, uh, we had discussed getting some relief on, I mean, because of the seriousness of the case." J.A. 234-235.

The court asked Brillon whether Brillon wanted to have Mr. Donaldson fired "based on everything," and Brillon responded, "Exactly." J.A. 237. The court agreed to dismiss Mr. Donaldson, and the State requested that the case be scheduled for a status conference in thirty days, as "Our concern is that even if counsel gets assigned that somehow the case is going to fall through the cracks." J.A. 240-241. The court indicated that there would be a status conference scheduled as soon as they knew who the new attorney would be. J.A. 241.

E. Brillon's Fifth Lawyer, David Sleigh, Withdrew Due to Changes in His Contract with the Office of the Defender General.

Five days later (which included the Thanksgiving Holiday), on December 2, 2002, the Office of the Defender General notified Brillon's fifth lawyer, David Sleigh, that the case was assigned to him. J.A. 155. For some reason, the court was not notified of this appointment until January 15, 2003. *Id.*

On February 25, 2003, Mr. Sleigh moved to continue the various deadlines, due to the fact that he had been on trial in Chicago for much of the month of February. J.A. 117. But then, on April 10, 2003, Mr. Sleigh filed a Notice of Withdrawal, J.A.

118, due to "modifications" in his firm's contract with the Defender General. J.A. 158.

F. Brillon's Sixth Lawyer, Kate Moore, Took Brillon's Case to Trial.

On April 21, 2003, Brillon filed a pro se motion to dismiss his case "For Lack of a Prima Facie Case," in which he also asked to be allowed to proceed pro se. J.A. 123. On May 7, 2003, Brillon filed a pro se motion to "Dismiss in the Interest of Justice," in which he also asked to be allowed to proceed pro se. J.A. 135. The court initially scheduled a hearing on these motions, but then continued the hearing until a new attorney became available. J.A. 28.

For nearly four months between April 10, 2003 and August 1, 2003, Brillon was without a lawyer. There is little indication of why this was so in the court record, other than a June 20, 2003 letter from the Office of the Defender General to the court clerk. J.A. 159. In that letter, the Business Manager explains that the Defender General had received funding to provide a fourth serious felony unit, and that Kate Moore would be hired as of August 1, 2003. *Id.*

Ms. Moore was assigned as Brillon's counsel on August 1, 2003. After initially filing a motion to extend the deadlines, she got up to speed and filed a number of motions in the following months, including a motion to dismiss, a motion to compel discovery, a motion to bifurcate, a motion to transfer the defendant to a nearby correctional facility, at

least two motions in limine, and multiple objections to various State notices. J.A. 28-32.

The trial began on June 15, 2004, and the jury convicted. J.A. 39. Thereafter, Ms. Moore filed many additional motions, including a motion for judgment of acquittal, a motion for a new trial, a renewed motion to dismiss, and a motion to withdraw the jury waiver and dismiss the habitual offender enhancement. J.A. 40.

* * *

In sum, even though Brillon's trial took place nearly three years after his arraignment, there was not a single delay that was attributable to the prosecution. All of the delays were caused directly by Brillon (by firing three lawyers, and threatening one of those three); or indirectly by Brillon (by firing three lawyers and threatening one of them, he made it extremely difficult for the Defender General to obtain replacement counsel); or by his counsel. The prosecution was ready to try the case in February of 2002 (less than seven months after the arraignment), and, had Brillon not fired his first attorney, the attorney undoubtedly would have been ready by that time as well. Despite Brillon's firing his first lawyer, Brillon's third counsel was ready to go to trial within a year of Brillon's arraignment, and the trial did not go forward *only* because Brillon threatened that lawyer's life. The prosecution objected time and again to Brillon's delay tactics, and diligently pressed the case forward at every opportunity.

II. UNDER *BARKER V. WINGO*, DELAYS CAUSED BY THE DEFENSE SHOULD NOT BE CHARGED TO THE PROSECUTION.

In this case, the Vermont Supreme Court held that a speedy trial violation occurred even though, as discussed above, there is no dispute in the record that: (1) every day of delay was the result of the actions of defendant and his counsel; (2) the State never requested a continuance, and objected, time and again, to the motions for delay that the defense filed; (3) the prosecution made clear that it was ready for trial within six months of Brillon's arraignment; (4) after Brillon delayed the case by firing his first lawyer in what appears to have been a purposeful act to avoid trial, his third lawyer represented that he was nonetheless essentially ready for trial within a year of arraignment – at which point, Brillon threatened the attorney's life, forcing further delay due to the need to once again appoint replacement counsel; and (5) subsequent delays were wholly the fault of Brillon's counsel. As a result, Brillon was freed with no chance of reprosecution.

The holding of the Vermont Supreme Court is constitutionally untenable. It is flatly inconsistent with the historical basis for the speedy trial right, this Court's controlling decision in *Barker v. Wingo*, and virtually every state and federal decision following *Barker v. Wingo*.

The Sixth Amendment to the Constitution provides that, "In all criminal prosecutions, the

accused shall enjoy the right to a speedy trial ...." The Constitutional right to a speedy trial predates not only the Constitution but also the Magna Carta (1215), with the earliest written references going back to 1166. *See Klopfer v. North Carolina*, 386 U.S. 213, 223-34 (1967).

Over 100 years ago, this Court described the purpose behind the speedy trial right and subsequent speedy trial statutes as a protection against abuses of government:

> It is doubtless true that in some cases *the power of the government has been abused, and charges have been kept hanging over the heads of citizens*, and they have been committed for unreasonable periods, resulting in hardship. With a view to preventing such wrong to the citizen, statutes have been passed in many states similar to the one under consideration, in aid of the constitutional provisions, national and state, intended to secure to the accused a speedy trial.

United States v. Cadarr, 197 U.S. 475, 478 (1905) (emphasis added).

Clearly, this is not a case where the government has kept "charges . . . hanging over the head" of a defendant. To the contrary, the State consistently pressed for trial while the defendant and his counsel consistently sought delays. This hardly conforms to the historical circumstances that

lead to speedy trial protections – undeserved punishment inflicted on citizens merely by charging and incarcerating them for lengthy periods with no effort to bring them to trial.

In *Barker v. Wingo*, 407 U.S. at 530-31, this Court established a four-part balancing test "which courts should assess in determining whether a particular defendant has been deprived of his [speedy trial] right." The Court identified four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. The issue in this case involves only item (2), the reason for the delay.

Under *Barker*, there is no basis for holding that delays caused by the defendant or his counsel could rise to a constitutional speedy trial violation. Indeed, this Court noted that defendants often delay prosecution *intentionally*:

> A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. *Delay is not an uncommon defense tactic.* As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus,

> unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.

407 U.S. at 521 (emphasis added).

In this case, there is ample evidence that many of Brillon's delays were intentional. For example, when Brillon's efforts to continue the case to a time when Judge Carroll would have rotated out of the county failed, he fired his first lawyer, Mr. Ammons, and thereby ensured that he would have a new judge. Similarly, when he tried to fire his third lawyer, Mr. Altieri, and it appeared that he would not succeed in that effort – and that, as a result, the case would go to trial shortly thereafter – he threatened Mr. Altieri's life, forcing a withdrawal. Furthermore, Brillon knew, because the judge told him when he attempted to fire Mr. Altieri, that ad hoc counsel resources were "perilously thin," J.A. 227, (especially since Brillon had, by then already worked his way through three attorneys). Nonetheless, Brillon went ahead and fired his fourth lawyer, Mr. Donaldson, as well. It was Brillon's actions – firing three lawyers, and threatening the life of one of those three – that set into motion all of the delays that followed.

In fact, under the reasoning of *Barker v. Wingo*, and its recognition that delay can be caused by and be in the interest of a defendant, any claim of a speedy trial violation should not be cognizable after the point when Brillon prevented the trial by

firing his first attorney, and certainly not after he threatened the life of his trial-ready third attorney and forced his withdrawal. There is absolutely nothing in the record suggesting any subsequent conduct by the prosecution to intentionally delay trial that might even theoretically revive Brillon's speedy trial claim.

The mere fact that Brillon's counsel – including the attorney whose life Brillon threatened – were state-appointed does not somehow create a constitutional speedy trial violation where none otherwise exists. To the contrary, in *Barker v. Wingo*, when describing factor (2) (the reason for the delay), this Court never even suggested the possibility that a speedy trial violation could be caused by a defendant or defendant's counsel, private or appointed. The Court only described the reasons for delay in terms of acts by the prosecution or the courts:

> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid

> reason, such as a missing witness, should serve to justify appropriate delay.

407 U.S. at 531.

The Vermont Supreme Court quoted this language regarding "overcrowded courts," and "the ultimate responsibility for such circumstances must rest with the government," *see* Pet. App. 16, but failed to recognize the important distinction between overcrowded courts (where, presumably, one case among many may get lost in the shuffle), and a situation where, as here, defendant and his counsel are solely responsible for the delay. In any event, there was no issue here of overcrowded courts, nor is there any evidence of negligence on the part of the State or the judicial system.

Indeed, the record shows only that, after firing three lawyers and having a fourth lawyer conflicted out, Brillon created a situation where the Office of the Defender General, through no fault of its own, had difficulty finding a replacement. Such difficulties, in a rural state like Vermont with a paucity of criminal lawyers, are understandable, particularly where a criminal defendant threatened to kill his third lawyer. The fact that Brillon was exhausting the supply of assigned counsel, and the possibility that many lawyers might have been loathe to represent Brillon, was Brillon's fault, and no one else's. To premise a constitutional speedy trial violation on such circumstances, which were wholly the fault of the defendant who fired his first counsel, and then threatened and forced the withdrawal of this trial-ready third attorney, is

completely illogical. While it is theoretically conceivable that a systemic under-funding of the program for appointing defense counsel could create a constitutionally cognizable issue if speedy trial violations were occurring in case after case, there is absolutely no such record or claim here.[4]

Not only does nothing in *Barker* support the result that the Vermont Supreme Court reached here, numerous circuit courts have made clear that delays caused by defendants and/or defense counsel cannot arise to a speedy trial act violation. *See, e.g.*, *Rashad v. Walsh,* 300 F.3d 27, 34 (1st Cir. 2002), *cert. denied*, 537 U.S. 1236 (2003) (noting that when "delay is caused by defendant, delay does not count

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[4] The majority stated that, "Because of the limited record before us in this case, we cannot be sure if this case represents an aberration or a growing crisis in the provision of defender general services in Vermont." Pet. App. 5. In fact, there was no evidence whatsoever on this score. As the dissent made clear, that there was no record of a lack of public-defender resources:

> the majority's concern that delay in this case may have been due to inadequate public-defender resources is unsupported by the record. While the defender general obviously had trouble finding counsel during the fourteen months following defendant's threat to his second lawyer, this difficulty appeared no more attributable to lack of resources than to ordinary conflicts of interest, attorney retirement, contract modification, and defendant's own misconduct. None of the delay was shown to be caseload related.

Pet. App. 47.

against the state at all"); *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002), *cert. denied*, 537 U.S. 1049 (2002) (noting that, "If the delay is attributable to the defendant, 'he will be deemed to have waived his speedy trial rights entirely,'" *citing, United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995)); *Robinson v. Whitley*, 2 F. 3d 562, 571 (5th Cir. 1993) (holding that the Sixth Amendment "does not permit a criminal to take advantage of a delay that his own conduct occasioned"); *United States v. Brock*, 782 F.2d 1442 (7th Cir. 1986) (holding that the two and one-half-year delay after defendant's guilty plea did not violate the right to a speedy trial; delay was the result of defendant's actions); *United States v. Gomez*, 67 F.3d 1515 (10th Cir. 1995), *cert. denied*, *Gomez v. U.S.*, 516 U.S. 1060 (1996) (holding that twelve and one-half month delay did not rise to the level of a constitutional violation; delay attributable to the government was weighed against it only slightly because there was no indication of an attempt to gain a tactical advantage).[5] State courts have tended to follow this pattern as well.[6]

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[5] In addition to these cases that we have cited in the First, Third, Fifth, Seventh, Ninth and Tenth Circuits, district courts in the remaining circuits also follow this trend. *See, e.g.*, *State v. Malito*, 2008 WL 907542, at 3 (Conn. Super. March 18, 2008) (finding no constitutional speedy trial violation, in part because, "the record here unambiguously indicates that the defendant bears primary, if not sole, responsibility for the delay…"); *Vanlier v. Carroll,* 535 F. Supp. 2d 467, 478 (D. Del. 2008) (holding in part that, "Delays attributable to the defendant are not weighted against the Government"); *State v. Pittman*, 647 S.E. 2d 144, 156 (S.C. 2007) (finding that defendant's right to a speedy trial was not violated where there was no indication of prosecutorial negligence or intentional delay and defendant had contributed to the delay by asserting

complex defenses); *Payne v. Rees*, 738 F.2d 118, 123 (Ky. 1984) (noting that there was no speedy trial violation where, "There was no deliberate effort by the prosecution in this case to delay the trial, rather there was a negligent failure to proceed."); *State v. Woodruff*, 2008 WL 2415316, at 2 (Minn. App. June 17, 2008) (holding that defendant's right to a speedy trial had not been violated based in part because, "there is no evidence that the state intentionally delayed the proceeding and appellant, through his defense counsel, contributed to the delay…"); *Kramer v. State*, 652 S.E.2d 843, 846 (Ga. Ct. App. 2007) (finding no speedy trial violation where, "the delay resulted from numerous continuances from the trial calendar requested by and granted to Kramer…[T]hese delays cannot be attributed to or weighted against the State.")

[6] See, e.g., *People v. Chavez*, 650 P.2d 1310, 1313 (Colo. App. 1982) (finding no violation where delay was based on defense counsel's inability to try case within the speedy trial deadline); *Thomas v. State*, 933 So. 2d 995, 997 (Miss. Ct. App. 2006), *cert. denied*, 933 So.2d 982 (Miss. Jul 20, 2006) (noting that "Any delays in the prosecution caused by the defendant are not counted against the State when evaluating an alleged speedy trial violation"); *People v. Simpson*, 34 A.D. 3d 934, 939 (N.Y. App. Div. 2006) (finding that there was no speedy trial violation because "Any delay in the trial was due to proceedings initiated by the defense or ongoing plea negotiations and there is no evidence that the defense was impaired by the delay."); *Davis v. State*, 133 P.3d 719, 723 (Alaska Ct. App. 2006) (finding that delay attributed to defense attorney's request for additional time would toll the speedy trial clock); *Gamble v. State*, 85 S.W.3d 520, 524 (Ark. 2002) (noting that delays resulting from the defense requesting continuances or refusing to obtain counsel should not be charged against the state for speedy trial purposes); *People v. Griffin*, 365 N.E.2d 487, 490 (Ill. App. Ct. 1977) (finding that, "Since Griffin, through his attorney, was responsible for the continuance granted…statutory right to a speedy trial was not violated."); *Murray v. State*, 967 So. 2d 1222, 1226 (Miss. 2007) (noting that, "any delay attributable to Murray would toll the running of the 270-day statutory period."); *State v. Craig*, 739 N.W.2d

It is equally important that delays caused by the Office of the Defender General in its administration of counsel not be charged against the State. Whether one considers the four-month delay in assigning counsel to Brillon in April of 2002, or adds to that calculation the time for the two lawyers who had changes in their contracts, these delays would never have occurred if Brillon had not fired Mr. Ammons and Mr. Altieri. There is no evidence of any bad faith on the part of the Defender General, and there is good cause to believe that the difficulties in finding replacement counsel were likely due to Brillon's threat on Mr. Altieri's life. It would be one thing if this were a case where the Defender General had been suffering from insufficient resources and struggling with systemic delays, but the record shows the opposite. The Defender General immediately assigned five of the six different counsel to Brillon. Once Mr. Sleigh withdrew, the Defender General sought and promptly obtained more funds from the legislature to hire Ms. Moore. *See* J.A. 159-160.

More importantly, however, is the fact that the Office of the Defender General has every incentive to win the freedom of the defendants who are represented. It would be entirely inappropriate to permit individuals convicted of violent crimes to walk away unpunished because of delays caused by the Defender General, when the Defender General is trying to obtain that very result through the normal

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206, 214 (Neb. Ct. App. 2007) (finding that delay solely attributable to the accused will toll the speedy trial period).

means (with motions to dismiss, jury trial acquittals, etc.). Again, in a perverse way, if the Court permits administrative delays by the Defender General to be attributed to the State, the Defender General will now have every motive to delay assigning counsel.

Moreover, when considering the specific issue here – delays caused by a defendant who has changed his court-appointed counsel – the courts are unanimous in finding no speedy trial violation.[7]

Against this overwhelming backdrop, the Vermont Supreme Court relied on two state court decisions that do not even suggest that a

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[7] *See, e.g.*, *Roberson v. State*, 864 So. 2d 379, 394 (Ala. Crim. App. 2002), *cert. denied*, (May 16, 2003) (finding no speedy trial violation where defendant was represented by five different attorneys during the pendency of the proceedings, all of whom withdrew due to defendant's uncooperative behavior); *United States v. Lagasse*, 269 F. App'x 87 (2d Cir. 2008) (finding no speedy trial violation where defendant's decision twice to discharge his counsel contributed to the delay); *United States v. Sutcliffe*, 505 F.3d 944, 957 (9th Cir. 2007) (finding no speedy trial violation where defendant sabotaged his relationship "with each appointed attorney, necessitating the delays"); *United States v. Brown*, 498 F.3d. 523, 531 (6th Cir. 2007) (finding no speedy trial violation where defendant sought new counsel); *State v. King*, 580 S.E.2d 89, 93 (N.C. Ct. App. 2003) (finding no speedy trial violation where delay was "largely due to defense counsel's trial preparation and the withdrawal of several attorneys due to conflicts with defendant"); *State v. Fischer*, 744 N.W. 2d 760, 770 (N.D. 2008) (finding no speedy trial violation where delays were due to defendant's "dissatisfaction with his attorneys, which resulted in multiple changes of court-appointed counsel"); and *People v. Kaczmarek*, 798 N.E. 2d 713, 719 (Ill. 2003) (finding no speedy trial violation where defendant was represented by six different attorneys).

constitutional speedy trial violation occurred in the present case. The Vermont Supreme Court relied on dicta in *People v. Johnson*, 26 Cal. 3d 557, 571 (1980), where the California Supreme Court stated that the purpose of the speedy trial right is to protect defendants against delays caused by "not only the prosecution, but the judiciary and those whom the judges assign to represent indigent defendants," but the California court nonetheless affirmed the conviction. Furthermore, under the California law at issue, a finding of a speedy trial violation would "not result in defendants' escaping trial for serious crimes they may have committed." *Id.* at 573. Clearly, the California law and the decision in *Johnson* do not support the Vermont Supreme Court decision in *Brillon*.

The Vermont Supreme Court also relied on an appellate decision from New Mexico, *State v. Stock*, 147 P.3d 885, 891 (2006), where the New Mexico court of appeals dismissed a conviction due to speedy trial violations, finding that "both parties bear some responsibility for the delay." The New Mexico Court found that some of the delays were caused by "the neglect of his overworked public defenders," *Id.* at 676, but that the state, too, was responsible. The court found that the state acted with "bureaucratic indifference," which was worse than mere negligence, in doing nothing to move the case forward. *Id.* at 892. Unlike the prosecution in *Stock*, here there is no dispute that Brillon's delays were all caused by Brillon and his counsel, and that the State consistently opposed delay and pressed for trial.

In sum, no other court has ever vacated a conviction and barred a retrial for speedy trial violations where the defendant or his counsel caused all the delays. The reason is obvious. Defendants already have multiple strategic reasons to cause a delay. *See Barker v. Wingo*, 407 U.S. at 521. If the Court were to permit defense delays to result in unconditional freedom regardless of guilt, the floodgates would open as defendants would try, as Brillon did, to work the system to their ultimate benefit. Quite clearly, providing this incentive would turn the historical rationale and the rule of this Court's cases on its head and makes no constitutional sense. Moreover, as discussed below, it would create different speedy trial rights for indigent and non-indigent defendants.

III. THE *BRILLON* DECISION IMPROPERLY CREATES DIFFERENT SPEEDY TRIAL RIGHTS WITH DIFFERENT BENEFITS AND DEFICITS FOR INDIGENT AND NON-INDIGENT DEFENDANTS.

As we have just discussed, the Vermont Supreme Court's decision is flatly inconsistent with core speedy trial rationales. Moreover, the decision at issue provides different speedy trial rights to indigent defendants than defendants who are able to retain private counsel, since only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test. However, while affording indigent defendants greater speedy trial rights, the Vermont ruling also puts indigent defendants at an inherent disadvantage because the State (and the

trial courts) must treat every request for a change of counsel and every request for continuance as though it will be charged against the State for speedy trial purposes. Accordingly, indigent defendants are now in peril of being forced to trial before their counsel is ready, and with counsel who otherwise would have been permitted to withdraw, while defendants who can afford counsel do not face these risks.

Creating a different rights structure for indigent and non-indigent defendants violates the basic premise of our criminal justice system and is constitutionally impermissible. In *Gideon v. Wainwright*, 372 U.S. at 344, this Court made clear that the right to counsel was required in order to make every defendant "equal" under the law:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The constitutional defect of a system with different speedy trial rights for indigent and non-indigent defendants is confirmed by the practical effects for each class of defendant. While all defendants facing a likely conviction and a lengthy sentence may chose as a strategic matter to delay trial in the hope that prosecution witnesses may

move away or forget the events, such a decision of intentional delay always came with a price: the defendant would have to waive his speedy trial rights. Under the ruling in *Brillon*, however, indigent defendants no longer have this concern. If they delay by firing their assigned counsel, or if their public defender delays by doing nothing for an extended period of time, all of that delay may be charged against the State under the *Barker v. Wingo* test. Indeed, under *Brillon*, intentional delays may succeed not only in undermining the prosecution's case, but in eliminating the case altogether by getting the case dismissed for speedy trial violations *caused by the defense*. In contrast, defendants who retain counsel do not have this right. Delays caused by private counsel, or by a defendant who retains private counsel, are all charged to the defendant because his lawyer is not funded by the state. This kind of inequality, determined solely on who pays the lawyer, defies the fundamental purpose behind *Gideon*.

At the same time, the Vermont Supreme Court's decision has, in practice, put indigent defendants at a certain and significant disadvantage. Under the *Brillon* ruling, all delays caused by an indigent defendant or publicly-funded counsel are now charged against the State under the *Barker v. Wingo* test, including every change in assigned counsel, and every continuance. As a result, the State is required to assess requests for a change in counsel and for continuance differently for indigent and non-indigent defendants. If the request that will result in a delay is made by private counsel, the State need not be concerned that the delay might

result in a speedy trial violation. On the other hand, the State must look at every request for delay by a publicly-retained lawyer with close scrutiny and likely oppose the request, as every delay will be charged to the State. The courts likewise would necessarily be reluctant to grant any request by an indigent defendant that would cause delay. As a result, the State and the courts are put in the untenable position of treating indigent defendants differently solely because their counsel is retained by the state. Indigent defendants may by forced to trial before their counsel is ready, or may be denied a change in counsel, solely because those delays may one day add up to a speedy trial violation. However, private counsel will continue to have all the time they require. These differences, providing different advantages and disadvantages depending on whether a defendant is indigent or non-indigent, are inconsistent with the fundamental premise of *Gideon* – that all defendants should be treated equally.

In sum, the Vermont Supreme Court has opened a Pandora's box, by crossing a line that no other court has dared to cross, and creating complete chaos in the legal system. The State of Vermont urges this Court to vacate the Vermont Supreme Court's ruling, and to establish a rule that prevents this outcome.

IV. THE COURT HAS JURISDICTION TO CONSIDER THE STATE'S POLICY ARGUMENT.

Brillon's claim that this Court cannot consider the State's argument in Section III, because it was purportedly not raised before the Vermont Supreme Court, *see* Respondent's Brief in Opposition, State of Vermont v. Michael Brillon, No. 08-88 (S. Ct. Aug. 12, 2008), is completely without merit for three reasons. To begin with, the argument at issue was presented to the Vermont Supreme Court. Moreover, even if one assumes for the sake of argument that the argument was not presented, this Court can consider arguments raised for the first time in this Court when the Federal question at issue was raised below and the argument merely enlarges the Federal question. Finally, it is also within the Court's discretion to consider a Federal question not raised below.

A. The State Did Raise These Arguments in the Vermont Supreme Court.

First, although Appellee claims that the State did not raise the second question before the Vermont Supreme Court, that is not accurate. Although the State did not raise this argument in its initial state-court briefs or oral argument, the State did raise the argument in its Motion for Reargument, and the Vermont Supreme Court was afforded the opportunity to consider the argument (it declined to do so).

This Court has repeatedly held that federal questions presented to the state courts for the first time in a petition for rehearing (the equivalent of Vermont's procedure of a motion for reargument) can be "sufficiently well presented to the state courts to support [this Court's] jurisdiction." *See*, *e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (considering claim raised for the first time in a petition for rehearing in the Illinois Appellate Court); *Hathorn v. Lovorn*, 457 U.S. 255, 264-65 (1982) (considering claim raised for the first time in a petition for rehearing). *Cf. Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945).

The State clearly presented these arguments in its Motion for Reargument, which stated in pertinent part that:

> [T]he Court should reconsider its decision in light of the public policy concerns that this decision creates. The Court's decision will have a detrimental effect on the relationship defendants have with their public defenders. Under the decision, defendants will now be encouraged to object to continuances requested by their counsel, even if the continuances are in the client's best interest. Indeed, defendants will be encouraged to change counsel as often as possible in the hope that mere delay will force their freedom.
>
> The Court's decision will have a chilling effect on replacing public

> defenders when a defendant seeks new counsel. As a result of this decision, the State must now oppose requests for a change of counsel because it will necessarily cause a significant delay. Similarly, courts will hesitate to assign new counsel when defendants request it.
>
> Lastly, the Court's decision will push poor defendants – those who have public defenders – to trial even though their counsel may need more time to prepare a defense, while allowing wealthier defendants who retain private counsel to request continuances without consequence. Prosecutors and the courts can no longer agree to reasonable continuances requested by public defenders due to concern that the continuances may be applied against the State and the case dismissed on speedy trial grounds. The end result is that poor defendants may be pushed to trial before their counsel is ready, while wealthy defendants will have all the time they require.

J.A. 149-150. Clearly, the argument was raised before the Vermont Supreme Court, and the state court therefore was afforded the opportunity to decide the issue. It declined to do so, and now the argument is ripe for this Court's consideration.

In addition, it is important to note that the State did not raise this argument before the Vermont Supreme Court in its initial brief because it was simply unfathomable that the Vermont Supreme Court would rule as it did, and it was only in the aftermath that the State realized the broad ramifications of the decision.

Once the Vermont Supreme Court rendered its decision, the State analyzed the decision, and then struggled to operate in the new landscape it created. It became readily apparent at that time that all requests for continuance by publicly-funded lawyers, and all requests for a change of publicly-funded counsel, could count against the State for speedy-trial purposes. As a result, the State was put in the untenable position, as described above, of having to consider such requests differently depending on whether the lawyer who made the request was publicly-funded. The State realized, immediately after the decision, that this created an important public-policy concern, and raised this issue in its Motion for Reargument.

Accordingly, the Court should consider the issue because it was raised in the State's Motion for Reargument, and, in addition, could not reasonably have been raised any sooner.

B. This Court May Consider Arguments Raised for the First Time in This Court.

Even if one were to assume for the sake of argument that the argument was not raised in the state courts (despite the evidence to the contrary),

this Court could still consider the argument for two separate reasons: first, because it merely enlarges the Federal question that was decided by the Vermont Supreme Court; and second, because it may be within the Court's discretion to consider Federal questions not raised in the state courts below.

1. The Court may consider new arguments that merely enlarge the Federal question decided below.

The Court may consider the State's second argument because the argument merely enlarges the underlying Federal question that was argued and decided in the state court below.

Although the Court generally will not review a question presented unless it was "either addressed by or properly presented to the state court," *see*, *e.g.*, *Howell v. Mississippi*, 543 U.S. 440, 443 (2005), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997), the Court has made clear that this rules does not apply to arguments that merely enlarge the Federal question presented. Indeed, it has been the rule since at least 1899 that, "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). As the Court said in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995), *citing*, *Yee v. City of Escondido, California*, 503 U.S. 519, 534 (1992), "Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties

are not limited to the precise arguments they made below.'" *See also Illinois v. Gates*, 462 U.S. 213, 220 (1983), where the Court explained further that, "We have not attempted, and likely would not have been able, to draw a clear-cut line between cases involving only an 'enlargement' of questions presented below and those involving entirely new questions."

This is precisely the case here. The Federal question – whether delays caused by an indigent defendant's public defender can arise to a speedy trial violation – was decided by the Vermont Supreme Court. Indeed, the Vermont Supreme Court expressly ruled that "the inaction of assigned counsel or a breakdown in the public defender system … is attributable to the prosecution and not defendant." Pet. App. 5. The State's second argument here – whether the right to counsel should result in broader speedy trial rights to indigent defendants – merely enlarges the first argument by explaining the ramifications of such a change in the existing law.

The cases cited by Brillon support this distinction between cases which present an entirely new Federal question, and those which merely present new arguments in support of the Federal question which was raised in the state court below. For example, in *Illinois v. Gates*, *supra*, 462 U.S. at 217, this Court, after granting certiorari "to consider the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip," requested that the parties brief an additional issue – whether the exclusionary rule

should be modified. The Court then decided that the issue of modification was not presented to the state courts, and decided instead to "consider the question originally presented in the petition for certiorari." *Id.* In doing so, however, the Court made clear that there is an important distinction between Federal questions that were never raised below, and issues that are "so connected with [the substantive Fourth Amendment right at issue] as to form but another ground or reason for alleging the invalidity" of the decision below. *Id.* at 223, *citing Dewey v. Des Moines*, 173 U.S. at 197-98.

Similarly, in *Adams v. Robertson, et al.*, 520 U.S. at 92, the Court dismissed certiorari as improvidently granted because the entire Federal question before the Court was never raised in the state courts. In *Adams*, the Federal question – whether the certification and settlement of the class action dispute violated the Due Process Clause of the Fourteenth Amendment – was never raised by the parties nor discussed by the state courts. *Id.* at 86. The same is true for *Howell v. Mississippi*, 543 U.S. at 443, where the petitioner "did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases." The Court therefore concluded that the petitioner "did not . . . raise this claim in the Supreme Court of Mississippi, which unsurprisingly did not address it." *Id.* at 441. And the petitioner's claims in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) had the same fatal flaw, as "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below."

In contrast, here, both parties cited *Barker v. Wingo* in the briefs in the Vermont Supreme Court, and the court decided the entire appeal based on the application of the *Barker v. Wingo* factors. Clearly, that Federal question was both "pressed" and "passed on" by the Vermont Supreme Court. The State's second argument here merely enlarges the very issue that the Vermont Supreme Court decided. Accordingly, the Court should consider the argument.

2. The Court May Also Have the Discretion to Decide Federal Questions that were not Presented Below.

Finally, the Court may also consider the State's second argument for the additional reason that the Court may have the authority to use its discretion to consider a Federal question even if the question was never raised in the state court below.

This Court has never decided whether the limitation on Federal questions that were subject to the "not pressed or passed upon below" rule in deference to state supreme courts is jurisdictional or prudential. *See*, *e.g.*, *Howell v. Mississippi*, 543 U.S. at 445-446, *citing*, *Adams v. Robertson*, 520 U.S. at 90 (noting the split among prior cases, and determining that "we need not decide today 'whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential ….'"); *Illinois v. Gates*, 462 U.S. at 222-23 (noting that, "Whether the 'not pressed or passed upon below' rule is jurisdictional, as our earlier

decisions indicate … or prudential, as several of our later decisions assume … we need not decide").

In this case, where one of the most fundamental principles of criminal law is at issue, it would be prudent to consider all arguments. For this reason as well, the Court should consider the State's argument.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Vermont Supreme Court, and hold that delays caused solely by Brillon and his publicly-retained counsel cannot amount to a speedy trial violation.

Respectfully submitted,

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November 17, 2008